refusing to enjoin trespasses to land outside of the jurisdiction.[18] So for no purpose whatever was the right of action arising from a tortious injury to foreign real estate recognized as existing outside of the jurisdiction where the land was situated. The right was considered to be limited as is one depending wholly on a foreign statute, and although many such are given effect upon grounds of comity,[20] yet when an action on them is for the first time authorized by statute, such statute is held not to be retroactive for the same reason as was the one in the principal case.[21]

LEGAL DAMAGES IN EQUITY IN LIEU OF SPECIFIC PERFORMANCE.—The theory upon which equity awards damages in cases of specific performance is entirely different from that upon which it grants compensation. The grant of compensation is an equitable function incidental to specific performance, which is exercised in order that the equitable relief may be complete. But the award of damages is in lieu of specific performance and is the giving of a legal remedy.[1] It must

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[18]Northern Indiana R. R. *v.* Michigan Central R. R. (1853) 56 U. S. 233; Columbia National Sand Dredging Co. *v.* Morton (1906) 28 App. D. C. 288; Ophir Mining Co. *v.* Superior Court, *supra*; The Salton Sea Cases (C. C. A. 9th 1909) 172 Fed. 792, 812-816; 2 Columbia Law Rev., 51. The only cases *contra* are ones in which the main question involved was the enforcement of contract obligations and the injunction was granted incidentally thereto without consideration of the inherent difference in the nature of the relief. Great Falls Mfg. Co. *v.* Worster (1851) 23 N. H. 462; Alexander *v.* Tolleston Club (1884) 110 Ill. 65; Jennings Bros. & Co. *v.* Beale (1893) 158 Pa. 283, 27 Atl. 948; Harris *v.* Lumpkin (1911) 136 Ga. 47, 70 S. E. 869; Sutphen *v.* Fowler (N. Y. 1841) 9 Paige 280; see Carroll *v.* Lee (Md. 1832) 3 Gill. & J. 504. The lead of Chancellor Walworth in Sutphen *v.* Fowler, *supra*, does not seem to have followed or approved in New York since; see People *v.* Central R. R. of New Jersey (1870) 42 N. Y. 283; Atlantic & Pacific Telegraph Co. *v.* Baltimore & Ohio R. R. (1880) 46 N. Y. Super. Ct. 377, s. c. (1882) 87 N. Y. 355.

[20]See 26 Harvard Law Rev., 172.

[21]Fairclough *v.* Southern Pacific Co. (App. Div., 1st Dept. 1916) 54 N. Y. L. J. 2215.

[1]See Pomeroy, Specific Performance (2nd ed.) § 436. Equity generally grants compensation where a contract to convey land can be only partially performed because of some deficiency in the amount of or in the title of the vendor's estate, Pomeroy, Specific Performance (2nd ed.) § 434, unless the vendee knew at the time of the contract the nature and extent of the vendors's property. See Peeler *v.* Levy (1875) 26 N. J. Eq. 330. But equity is reluctant to give compensation where it cannot be computed with any degree of certainty. This is particularly true where a vendor has been unable to secure a release of his wife's dower, because dower is dependent upon the contingency of the survivorship of the wife. Humphrey *v.* Clement (1867) 44 Ill. 299; Reisz's Appeal (1873) 73 Pa. 485. A further reason for refusing compensation is the fact that the wife may be coerced through fear or affection to give up her dower rights. Aipel etc. Real Estate Co. *v.* Spelbrink (1908) 211 Mo. 671, 111 S. W. 480. Some courts do allow abatement in the purchase price for dower but the decisions do not clearly show how the value is determined, Sanborn *v.* Nockin (1873) 20 Minn. 178; Walker *v.* Kelly (1892) 91 Mich. 212, 51 N. W. 934, although in some instances it seems to be by use of the mortality tables. See Woodbury *v.* Luddy (1867) 96 Mass. 1; Sternberger *v.* McGovern (1875) 56 N. Y. 12. The contingency of survivorship makes such a method nothing

first be found that specific performance is impossible before damages will be given, and furthermore, the decree will not be given in the alternative.[2] The jurisdiction of equity over legal damages was early asserted in the case of *Denton* v. *Stewart*.[3] This was a case of a parol contract to convey land where the vendee had partly performed. Equity has ever since claimed jurisdiction in such cases because possession and part performance take the contract out of the Statute of Frauds in equity, but do not have such a result at law.[4] Inadequacy of legal relief and unjust enrichment of the vendor are, therefore, the two grounds that afford equitable jurisdiction in such cases. There was also another equity in *Denton* v. *Stewart*. The defendant vendor had deprived himself of the power to perform during the pendency of the suit against him for specific performance.[5] Such unconscientious conduct of the vendor has continued to warrant damages in equity.[6] The case of *Todd* v. *Gee* refused to extend the doctrine of *Denton* v. *Stewart* and expressly pointed out that law has jurisdiction over cases of damages, repudiating any inference which might be drawn from *Denton* v. *Stewart* of any equitable power to award damages in cases which cannot be retained on some other equitable basis.

Notwithstanding this strong case, an eminent text writer says that according to the preponderance of American authority, equity may exercise its discretion to grant damages where the plaintiff files his bill in good faith and is ignorant of the fact that the defendant cannot perform.[7] The authorities, however, are not very numerous on this point and for the most part consist of mere dicta.[8] As it is the good faith of the vendee in filing his bill that causes equity to exercise its discretion, it must follow that equity has jurisdiction even though the vendee knew when he commenced his action that the vendor could not perform.[9] The result of this Chancellor Kent suggests, would be to give equity jurisdiction of every other case

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short of a mere guess. See Humphrey *v.* Clement, *supra*. If compensation is not asked for in the action and partial conveyance has been complete, the plaintiff cannot bring another action at law for damages, because the judgment in equity determines the whole issue. Head *v.* Meloney (1885) 111 Pa. 99, 2 Atl. 195.

[2]Levy *v.* Knepper (N. Y. 1907) 117 App. Div. 163, 102 N. Y. Supp. 313; *cf.* Milkman *v.* Ordway (1870) 106 Mass. 232.

[3](1786) 1 Cox's Eq. Cases 258.

[4]Superior Oil & Gas Co. *v.* Mehlin (1910) 25 Okla. 809, 108 Pac. 545; Jervis *v.* Smith (N. Y. 1840) 1 Hoff. Ch. 470; see Jones *v.* Gainer (1908) 157 Ala. 218, 47 So. 142.

[5]Todd *v.* Gee (1810) 17 Ves. Jr. *274. This case calls particular attention to this equity in Denton *v.* Stewart.

[6]Chapman & Harkness *v.* Mad River etc. R. R. (1856) 6 Ohio St. 119.

[7]1 Pomeroy, Eq. Jur. (3rd ed.) § 237, n. 3 at p. 344.

[8]See Morss *v.* Elmendorf (N. Y. 1844) 11 Paige 277. This case is generally cited as an authority for the proposition. See also Milkman *v.* Ordway, *supra*. For a good criticism of this claim to jurisdiction see Lewis *v.* Yale (1852) 4 Fla. 418, 438.

[9]But equity will leave the parties to their law actions in such cases because it will not abuse its discretion. Hill *v.* Fiske (1854) 38 Me. 520; Wright *v.* Suydam (1910) 59 Wash. 530, 108 Pac. 610; Public Service Corp. *v.* Hackensack Meadows Co. (1906) 72 N. J. Eq. 285, 64 Atl. 976.

sounding in damages and cognizable at law.[10] Accordingly, equity might claim jurisdiction of all cases of breach of contract. But is it the contract itself upon which equity retains jurisdiction when once it has found specific performance entirely impossible? Some authority for such a proposition may be found in cases of negative covenants. But here again the decisions are based upon mere dicta or are poorly reasoned holdings based on dicta in previous cases. The jurisdiction over most of such cases can be better placed on the ground of inadequate relief at law.[11] This too might be the reason for the exercise of jurisdiction over damages in cases of specific performance. By inadequacy of legal relief here is meant that the plaintiff cannot go into the market with the damages awarded in law and get the same *res* to which he was entitled under his contract. So in the case of non-unique chattels equity does not claim jurisdiction because the plaintiff can easily obtain another such chattel. But where the vendor is unable to convey and the plaintiff innocently files his bill for performance, equity gives no more adequate damages than law for it determines the damages by the same standard. The peculiar position is reached then, of equity retaining jurisdiction because of inadequacy of damages at law even though the damages in equity are just as inadequate.[12] The fact that the damages are adequate in law in the case of a non-unique chattel suggests that it is not the contract but rather the subject matter of the contract which gives jurisdiction. As land has always been regarded as unique, equity might claim jurisdiction of a contract to convey land and then retain jurisdiction in a proper case for the award of damages.[13]

This discussion is, however, more academic than practical in view of modern legislation combining equitable and legal procedure. Many of the former prerequisites necessary to invoke equitable jurisdiction no longer exist.[14] But the legal rights of the parties still remain unchanged. Thus, when a case is retained for damages, which would not formerly be given in equity, the bill will be struck from the equitable calendar and sent to the jury for trial.[15] But if the defendant does not insist upon his right to a jury trial he cannot later object to an award by a referee.[16] The effect of the combined procedure is shown in the recent case of *Warren* v. *Dail* (N. C. 1915) 87 S. E. 126. In this case a married woman contracted to convey a greater estate than she owned. A statute made it possible for a married woman

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[10]Kempshall *v.* Stone (N. Y. 1821) 5 Johns. Ch. 193; Hatch *v.* Cobb (N. Y. 1820) 4 Johns. Ch. 559.

[11]See 5 Columbia Law Rev., 153.

[12]It is suggested that equity retains jurisdiction in order to prevent injustice to the vendee, who, otherwise, would incur the expense and inconvenience of another suit at law. But, it is submitted, that this is not complete justice for it deprives the vendor of his legal right to a trial by jury.

[13]For a discussion of other cases than contracts for specific performance in which equity gives damages, see Woodman *v.* Freeman (1846) 25 Me. 531, 543.

[14]Sternberger *v.* McGovern, *supra*; Huey *v.* Starr (1909) 79 Kans. 781, 101 Pac. 1075; Riverside Co. *v.* Sawyer (1913) 24 Colo. App. 442, 134 Pac. 1011.

[15]Messenger *v.* Chambers (N. Y. 1907) 53 Misc. 117, 103 N. Y. Supp. 1100; Stevenson *v.* Buxton (N. Y. 1861) 37 Barb. 13.

[16]Barlow *v.* Scott (1861) 24 N. Y. 40.

to contract but prevented her from conveying without the written consent of her husband. The plaintiff had constructive notice of the extent of the estate and that the woman was married. The defendant set this up as an equitable defence to an action for breach of contract. The court points out that although under former equitable procedure the plaintiff would have no standing because of the constructive notice of the impossibility of specific performance, this was no longer an obstacle under modern procedure. Moreover, the action in the principal case was brought in legal form for breach of contract, and the equitable rules do not govern such actions under the combined procedure any more than they did at common law.

STATUTORY HEIRS.—An interesting and novel question was presented in the recent case of Matter of Leslie (N. Y. Surrogate's Ct., N. Y. Co. 1915) 92 Misc. 662, 156 N. Y. Supp. 346, in which Surrogate Fowler of New York County held that it was beyond the power of the legislature to create an heir, and that a statute purporting to do so[1] operated only as an assignment of the state's right of escheat. The Surrogate assumed it to be settled law that the state is not entitled to contest the probate of a will in order to establish its right to caducary succession and therefore held that the statutory heir, as assignee of this right, was in no better position, and was concluded by the probate to which he had not been cited.

Although its right of escheat does not constitute the state an heir nor entitle it to be cited to the probate of a will,[2] it has been held to be such an interest in the estate as to justify the sovereign in contesting probate in order to establish intestacy and secure caducary succession.[3] The principal case, therefore, seems a narrow and doubtful decision even if the Surrogate's interpretation of the legal effect of the statute be accepted, for the assignee of the right of escheat should be in as good a position in regard to the probate of a will as his assignor, the state.

Despite dicta from various eminent judges, it seems to be fairly well settled in this country that there are no extra-constitutional limitations on legislative power.[4] But even if there were some sub-

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[1]N. Y. Consol. Laws, Ch. 13; Laws of 1909, Ch. 18, § 91. *"Relatives of husband or wife.* When the inheritance shall have come to the intestate from a deceased husband or wife, as the case may be, and there be no person entitled to inherit under any of the preceding sections, then such real property of such intestate shall descend to the heirs of such deceased husband or wife, as the case may be, and the persons entitled, under the provisions of this section, to inherit such real property, shall be deemed to be the heirs of such intestate."

[2]State *v.* Ames (1871) 23 La. Ann. 69.

[3]State *v.* Lancaster (1908) 119 Tenn. 638, 105 S. W. 858; see State *v.* Superior Ct. of Sacramento County (1905) 148 Cal. 55, 82 Pac. 672; Davis *v.* Davis & Davis (1824) 2 Add. Eccl. 223. In the jurisdiction of the principal case there is an early decision in which the right of the state to contest probate under such circumstances was not questioned although the will was upheld. Combault *v.* Public Administrator (N. Y. 1859) 4 Bradf. Surr. 226; but see Hopf *v.* State (1888) 72 Tex. 281, 10 S. W. 589.

[4]Cooley, Constitutional Limitations (7th ed.) 232-237; 29 Harvard Law Rev., 521. The only authority cited in the principal case for the invalidity of constitutional statutes opposed to natural right is the ancient English case of Day *v.* Savadge, Hob. 85, 87, which is admittedly no longer law in England. 1 Bl., Comm., *160.